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IN THE

Supreme Court of the United States

October Term, 1992

PEOPLE *ex rel.* KENNETH MAULA,

Petitioner,

against

LLOYD FRECKLETON, Warden of the Rikers Island Correctional Facility,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1992 TERM

- x

PEOPLE ex rel. KENNETH MAULA,

Petitioner,

-against-

LLOYD FRECKLETON, Warden of the
Rikers Island Correctional Facility,

Respondent.

- x

QUESTION PRESENTED

1. Did the United States Court of Appeals for the Second Circuit deny to Kenneth Maula his constitutional right against double jeopardy in violation of the Fifth Amendment of the United States Constitution by construing the provisions of the New York Criminal Procedure Law Section 300.40 (7) so as to affirm his conviction for the crime of Criminal Possession of a Weapon in the Fourth Degree?

LIST OF PARTIES

The parties involved in the case before this Court are as follows:

Petitioner-Appellant in the Second Circuit Court and petitioner here.	Kenneth Maula
Respondent-Appellee the Second Circuit Court of Appeals and respondent herein.	Lloyd Freckleton, Warden of the Rikers Island Correctional Facility

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the Second Circuit Court of Appeals is reported as People ex rel. Maula v. Freckleton at 972 F2d 27 (1992) and is reprinted in the Appendix of this Petition at pp. 24-30. The opinion of the lower Court is reported as People ex rel. Maula v. Freckleton, 782 F.Supp.889 (S.D.N.Y. 1992) reprinted at pp. 31-52 of the Appendix.

Jurisdiction

The order of the Second Circuit Court of Appeals was entered August 6, 1992. This Court has jurisdiction under 28 USC Sec. 2254 (1).

Constitutional and Statutory Provisions Involved.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> "No person shall be subject for the same offense to be twice put in jeopardy of life or limb . . . "

Introduction

The issue presented in this case, which is one of first impression, is whether the petitioner is entitled to have his New York State conviction for the crime of criminal possession of a weapon in the Fourth Degree after a second trial set aside on the ground that it is violative of the Double Jeopardy clause of the Fifth Amendment of the United States Constitution.

Under the decision of the Court below, petitioner Kenneth Maula was found to have waived his rights afforded him under the double jeopardy provision of the Fifth Amendment of the United States Constitution because he failed to object to the non-submission of the weapons' counts at the conclusion of his first trial.

Petitioner was initially charged, in New York State Supreme Court, with the crimes of

Murder in Second Degree and various weapons' counts.

Without explanation, the Trial Court ultimately asked the jury to consider only the Second Degree Murder Count and lesser included homicide offenses; he determined sui sponte not to submit the weapons charges to the jury. Petitioner was convicted of the lesser included offense of manslaughter in the first degree. The Appellate Division, First Department, reversed petitioner's conviction. See People v. Maula, 526 N.Y.S.2d at 444-45.

Petitioner was then reindicted and under the new indictment he was charged with manslaughter in the First Degree along with the same weapons' counts that had previously been dismissed at the conclusion of the first trial. After a second trial, petitioner was convicted of the crime of criminal possession of a weapon in the Fourth Degree and acquitted of all other

charges. Petitioner was sentenced to a term of one year in prison.

The gravamen of petitioner's position is that there was no "manifest necessity" to warrant the non-submission of the weapons counts in the first instance and that petitioner's conviction of said count at the conclusion of the second trial was a nullity in that it violated the Double Jeopardy provision of the United States Constitution.

The Court below agreed in all respects with this proposition except that it held that petitioner waived his constitutional right against double jeopardy by failing to object to the non-submission of the weapons' counts. In so holding, the Court created an anomaly from which there is no escape since it is obvious that an attorney representing a defendant in a criminal case would never object to the non-submission of counts to the jury.

Instead, he has every right to rely upon the plain language of the applicable statute.

Statement of the Case

This case arises out of the fatal shooting of Dr. Louis DeBellis on July 18, 1985. At the time of the incident, the petitioner was approximately fifty years of age with no prior record of criminal activity. He was self-employed in the printing business. As a youth, he sustained an injury which rendered him blind in one eye. As a result, petitioner wears a prosthetic glass eye.

The decedent was an opthamologist. Both the petitioner and decedent owned real estate in the Bronx, New York.

Decedent had purchased property in Bronx County from petitioner and subsequently, petitioner and decedent became close friends. Their relationship deteriorated, however, when petitioner refused to perform an agreement to

sell decedent another property.

Decedent commenced an action against petitioner which resulted in a judgment that directed petitioner to sell the property to decedent. Petitioner obtained a stay of the decision pending appeal on the condition that he post a bond pending appeal.

On the day before the bond was due, petitioner and decedent engaged in a heated argument at petitioner's printing business, during which decedent beat the petitioner so that petitioner's glass eye became dislodged. Decedent threatened petitioner and promised to return and "blind him."

Decedent then left the premises. Petitioner, in fear of his life, removed a loaded gun from his desk and followed decedent downstairs to the parking lot where he fired three shots, killing the decedent. Petitioner was distraught at the time of the shooting.

He was in a daze and believed he was acting in self-defense.

The Instant Proceeding

On or about December 2, 1992, petitioner commenced the present proceeding by filing a writ of habeas corpus pursuant to 28 USC Sec. 2254 on the ground that his conviction on a gun charge in Supreme Court of the State of New York is invalid under the double jeopardy clause of the United States Constitution.

Prior to the commencement of this proceeding, petitioner fully exhausted his remedies in the State Courts.

During the course of all of these proceedings, there has been a stay of enforcement of the sentence imposed upon the petitioner based upon his otherwise unblemished record.

The Court's Decision of January 23, 1992

In pertinent part, the District Court

concluded on the writ that:

> "Petitioner has exhausted state remedies by giving the State Courts a fair opportunity to adjudicate his Fifth Amendment double jeopardy argument."

The Court below further held that "This Court finds that the State Court's decision not to submit the gun count to the jury did not rest on a determination of insufficient evidence.

Accordingly, the double jeopardy clause does not bar all reprosecutions. Retrial may be appropriate where a case is aborted for reasons other than an acquittal or insufficient evidence. See Arizona v. Washington, 434 U.S. 497, 505 (1978). For instance, in the case of a mistrial, retrial is appropriate where there was "manifest necessity" for aborting the trial

over a defendant's objections.[1] See id.

---

[1]"Manifest necessity" is found only if a "scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." United States v. Jorn, 400 U.S. 470, 485 (1971). The record must reflect that the trial court kept "in the forefront the defendant's valued right 'of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.'" United States v. Starling, 571 F.2d 934, 938 (5th Cir. 1978) (quoting Jorn, 400 U.S. at 486).

Factors courts have considered include whether the trial judge consulted counsel before declaring a mistrial, and whether the record indicates that the judge considered alternatives to declaring a mistrial. See Arizona v. Washington, 434 U.S. 497, 514 n. 34 (1978); Grandberry v. Bonner, 653 F.2d 1010, 1015 (5th Cir. 1981); Illinois v. Somerville, 410 U.S. 458, 469-70 (1973). "A precipitate decision, reflected by a rapid sequence of events culminating in a declaration of a mistrial, would tend to indicate insufficient concern for the defendant's constitutional protection." Brady v. Samaha, 667 F.2d 224, 229 (1st Cir. 1981); see also Lovinger v. Circuit Court of 19th Judicial Dist., 845 F.2d 739, 745-746 (7th Cir.) (court refused to find manifest necessity where judge made no record, did not consult with counsel and appeared to declare a mistrial in a rash fashion), cert. denied, 488 U.S. 851 (1988).

For the reasons stated below, this Court finds that the State Court's decision not to submit the gun count to the jury did not rest on a determination of insufficient evidence. Accordingly, retrial may be appropriate. To assess whether retrial is proper in this situation, this Court concludes, also for the reasons stated below, that the double jeopardy standard governing mistrials should also control non-submission of charges to a jury. Under the mistrial standard, where a defendant objects to a mistrial, reprosecution is permissible only if there was manifest necessity for declaring a mistrial. Where, however, a defendant consents to a mistrial, the state may retry a defendant unless the prosecutor or judge obtained defendant's consent in bad faith. See Oregon v. Kennedy, 456 U.S. 667 (1982); Lee v. United States, 432 U.S. 23, 32-33 (1977). United States v.

Dinitz, 424 U.S. 600, 606-07 (1976); Vazquez v. Scully, 694 F.Supp. 1094 (S.D.N.Y. 1988).

Therefore, a defendant who objects to the non-submission of charges may not face retrial unless the state can show manifest necessity for the non-submission. Where a defendant consents to the non-submission decision, however, retrial is appropriate unless the consent was induced by judicial or prosecutorial bad faith."

The Court below correctly found that there was no manifest necessity to warrant the non-submission of the gun counts to the jury in the first instance. However, the Court below further determined that petitioner's failure to object to the non-submission of said counts constituted a waiver of petitioner's rights against double jeopardy as set forth in the Fifth Amendment of the United States Constitution.

> "While it might seem anomalous to require a defendant to object to a dismissal of a count in order to invoke the higher protection against retrial afforded by the manifest necessity standard, New York law creates this bizarre situation."

The Court's Decision of August 6, 1992

In pertinent part, the United States District Court of Appeals for the Second Circuit affirmed the decision of the District Court in its entirety.

Reasons for Granting the Writ

The indictment relating to Appellant's first trial contained homicide and weapon counts. Justice Warner determined sue sponte not to submit the weapon counts to the jury.

Criminal Procedure Law Sec. 300.40 provides as follows:

> "6. Notwithstanding any other provisions of this section, the Court is not required to submit any particular count to the jury where....
>
> (b) The number of counts or the complexity of the indictment requires selectivity by the Court in order to

> avoid placing an unduly heavy burden upon the jury in its consideration of the case. In such case, the Court may submit to the jury a portion of the counts which are representative of the People's case.
>
> 7. Every count not submitted to the jury is deemed dismissed by the Court."

After the Appellate Division set aside Appellant's conviction for manslaughter, he was reindicted on a new accusatory instrument which contained a homicide count on the very same weapons counts previously dismissed.

Appellant's reprosecution on these weapons counts was a violation of the double jeopardy provisions under the United States Constitution.

The Fifth Amendment provides that no "person shall be subject for the same offense to be twice put in jeopardy of life or limb . . . " This provision applies to the States through the Fourteenth Amendment. See

Benton vs Maryland, 395 U.S. 784, 787 (1969). See, also, United States vs Scott, 437 U.S. 82, 91 (1978); Burks vs United States, 437 U.S.1 (1978).

Inasmuch as the State Court's determination not to submit the gun counts to the jury did not rest on a determination of insufficient evidence, the Court must then determine if there was "manifest necessity" for the non-submission of said counts. See Faux vs James, 728 F.Supp. 903 (1990).

The principles of "manifest necessity" as described in the context of a mistrial is found only if a "scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." United States vs Jorn, 400 U.S. 470, 485 (1971). The record must reflect that the trial court kept in the forefront the defendant's valued right

of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate. United States vs Starling, 571 F.2d 934, 938 (5th Cir. 1978). See, also, Arizona vs Washington, 434 U.S. 497 (1978) which held that:

> "The underlying idea of this principle is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that you thought possibly he may be found guilty."

See, also, Grandbury vs Bonner, 653 F.2d 1010, 1015 (5th Cir. 1981); Illinois vs Somerville, 410 U.S. 458, 469-70 (1973); Brady vs Samalia, 667 F.2d 224, 229 (1st Cir. 1981); Lovinger vs Circuit Court of 19th Judicial Dist., 845 F.2d 739.

It is clear from the record that there was no "manifest necessity" for the non-submission of the gun counts. Nor do the People argue that there was. In the only case dealing with this issue in the context of the non-submission of counts, Faux vs James, supra, a District Court applied "manifest necessity" to the dismissal of 126 counts of a 140 count indictment. One would be hard pressed to contend that "manifest necessity" would apply to two gun counts in a three count indictment.

Accordingly, petitioner concurs with Judge Edelstein's rationale that the standards applied in the context of a mistrial also apply with respect to non-submission of counts. The exception herein is to the determination of the Court below that the failure by trial counsel to object constitutes a waiver.

Judge Edelstein fully recognized

> "While it may seem anomalous to require a defendant to object to a

> dismissal of a count in order to invoke the higher protection against retrial afforded by the manifest necessity standard, New York law creates this bizarre situation."

This interpretation of New York law by Judge Edelstein that the defendant is obligated to object to a dismissal is not based on any statutory or case law relating to this section. CPL 300.40(7) expressly provides that the failure of a court to submit a count to a jury is deemed a dismissal by the court. There is no provision in this section that the failure of a defendant to object would constitute consent.

In United States vs Scott, supra, in reversing United States vs Jenkins, 420 U.S. 358, 1975, the Supreme Court restricted and limited the applicability of the double jeopardy provision of Article 5 of the United States Constitution by holding that where a defendant moves for a mistrial, in the midst

of a trial, (especially where he had an opportunity to do so before the commencement of the trial), he waives the defense of double jeopardy. Scott, however, specifically recognized that where a trial is aborted at the initiative of a trial judge before a verdict that the defense of double jeopardy would and does apply. In this case on appeal, the Judge on his own initiative dismissed the gun counts by refusing to submit them to the jury. Under the statutory provisions of CPL 300.4(7), such a dismissal cannot be deemed a termination initiated by the defendant. There is no evidence in the record to support the finding of the court below that the defendant consented to the dismissal. The colloquy set forth in Exhibit "1" of the People's affidavit in opposition dated December 4, 1991, states as follows:

> "MR. RAPPAPORT: Okay. I will await to hear that.

Are you going to submit any lessor including the gun charge?

THE COURT: No.

MR. RAPPAPORT: It's my --

THE COURT: I just gave you what I am submitting.

MR. RAPPAPORT: You're submitting Count 2?

THE COURT: No, I'm not.

MR. RAPPAPORT: Not at all?

THE COURT: No.

MR. RAPPAPORT: The guns are not going the jury at all?

THE COURT: No.

MR. RAPPAPORT: In other words, if they should find him not guilty of all four homicides that's the end of the case?

THE COURT: Yes.

MR. RAPPAPORT: No guns?

THE COURT: No.

MR. RAPPAPORT: I don't have to get involved with a gun discussion. All right.

THE COURT: You don't have a separate position."

This colloquy clearly establishes that the Judge on his own initiative elected not to submit these counts to the jury. In fact, the Court states to the defendant's attorney that he has no position and cannot interfere with the Court's dismissal of a count. The Court explicitly recognized in this colloquy the applicability of double jeopardy to the counts which have been dismissed. In fact, it is inconceivable that trial counsel would object to the non-submission of counts to the jury.

In any event, Justice Warner made it quite clear that defense counsel had nothing to say about his decision not to submit the gun counts.

Unlike the mistrial scenario where the defense may clearly make a cognitive determination whether to object, no such opportunity exists under the facts herein.

> " . . . where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has . . . been deprived of his valued right to have his trial completed by a particular tribunal. See United States vs Scott, 437 U.S. 82, 99-100 (1978)."

Justice Warner clearly indicated that trial counsel had "no separate position" with regard to the gun counts.

Finally, even if the dismissal of the gun counts did not rest upon insufficiency of evidence, it is nevertheless tantamount to a dismissal on the merits.

To interpret this section any other way would leave the State, at its discretion, to commit any number of abuses, i.e., suppose a defendant is charged with homicide and gun counts. The Court dismisses the gun counts pursuant to CPL Sec. 300.4(7). The defendant is acquitted of the homicide. Can the People reindict the defendant on gun counts?

The only rationale for such action is to punish a successful appellant which rationale has been flatly rejected in Price vs Georgia, 398 U.S. 323, where the Court held:

> "The Double Jeopardy Clause * * * is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial * * * is an ordeal not to be viewed lightly."

Conclusion

For the foregoing reasons, the petition for a writ of certiorari to the United States Supreme Court from the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

JOSEPH FROST
Appellate Counsel for
Petitioner
Law Offices of
Frost & Berenholtz
Counsel of Record for
Petitioner

APPENDIX A--OPINION OF THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, DECIDED AUGUST 6, 1992.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1571—August Term 1991

Argued: May 20, 1992 Decided: August 6, 1992

Docket No. 92-2103

KENNETH MAULA,

Petitioner-Appellant,

—against—

LLOYD FRECKLETON, Warden of the Rikers Island Correctional Facility,

Respondent-Appellee.

Before:

PRATT and ALTIMARI, *Circuit Judges*, and Daniel M. FRIEDMAN, *Circuit Judge* of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York, David N. Edelstein, *Judge*, denying a petition for a writ of habeas corpus. Petitioner claims that the state reprosecuted him

on a weapons possession count in violation of the fifth amendment's double jeopardy clause.

Affirmed.

JOSEPH FROST, New York, NY (Frost & Berenholtz, of Counsel), *for Petitioner-Appellant.*

DANIEL S. RATNER, Assistant District Attorney for Bronx County, Bronx, NY (Robert T. Johnson, District Attorney, Peter D. Coddington, Assistant District Attorney, of Counsel), *for Respondent-Appellee.*

PER CURIAM:

In August 1986 Kenneth Maula was indicted in New York Supreme Court, Bronx County, for murder in the second degree, criminal possession of a weapon in the second degree, and criminal use of a firearm in the second degree. After both sides had rested at trial, Maula moved to dismiss all three counts for insufficient evidence. The trial court denied the motion, but later during the same conference, informed counsel that it had decided to submit only the murder count to the jury. Maula raised no objection and, as a result, the court did not submit the two weapons counts to the jury.

The jury convicted Maula on a lesser included offense of manslaughter in the first degree. The Appellate Divi-

sion, however, reversed and remanded for a new trial. *See People v. Maula*, 138 A.D.2d 307, 526 N.Y.S.2d 441 (1st Dep't), *appeal denied*, 72 N.Y.2d 863, 532 N.Y.S.2d 513 (1988). The state then reindicted Maula, and the new indictment charged Maula with manslaughter in the first degree, criminal use of a firearm in the first and second degrees and criminal possession of a weapon in the second degree. Thus, the new charging instrument included the two weapons counts that had not been submitted to the jury at the first trial.

At the second trial the jury found Maula guilty of only one count, criminal possession of a weapon in the fourth degree. On direct appeal, Maula challenged only his sentence, and the Appellate Division remanded for resentencing. *See People v. Maula*, 163 A.D.2d 180, 558 N.Y.S.2d 42 (1st Dep't 1990).

In a subsequent state-court habeas proceeding, Maula contended for the first time that, under double jeopardy principles, nonsubmission of the weapons counts at the first trial barred his reprosecution on those counts at the second trial. His contention failed both in the state trial court and on appeal. *See People ex rel. Maula v. Freckleton*, 176 A.D.2d 590, 574 N.Y.S.2d 753 (1st Dep't), *appeal denied*, 78 N.Y.2d 962, 578 N.Y.S.2d 877 (1991).

Having exhausted his state remedies, Maula then sought a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Southern District of New York, David N. Edelstein, *Judge*. Judge Edelstein denied the writ, but granted a certificate of probable cause for appeal to this court. We affirm substantially for the reasons expressed in Judge Edelstein's opinion, *People ex rel. Maula v. Freckleton*, 782 F.Supp. 889 (S.D.N.Y.

1992); we write primarily to amplify the concept of consent in this context.

This case presents two important questions. One of them, a question of state law, is whether the nonsubmission of the weapons counts to the jury constituted an acquittal that barred reprosecution after the Appellate Division reversed the manslaughter conviction. On this issue the state courts held that reprosecution was permitted, with the Appellate Division noting that the trial court's decision not to submit the counts "was not based on legal insufficiency" and therefore was not an acquittal. *People ex rel. Maula*, 574 N.Y.S.2d at 754. The state court's determination that nonsubmission is not the equivalent of an acquittal under the statute reflects existing federal law, namely, that an acquittal occurs only when " 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged' ". *United States v. Scott*, 437 U.S. 82, 97 (1978) (brackets in original) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). Under established federal habeas principles, we must defer to the state court's determination of this issue of state procedural law. *See Estelle v. McGuire*, 112 S.Ct. 475, 480 (1991) ("it is not the province of a federal habeas court to reexamine state court determinations on state law questions").

The second important question is whether reprosecution of Maula on the nonsubmitted weapons charges offended the federal constitutional protection against double jeopardy, in particular, Maula's " 'valued right * * * to have his trial completed by the particular tribunal summoned to sit in judgment on him' ". *Scott*, 437 U.S. at 92 (quoting *Downum v. United States*, 372 U.S. 734, 736 (1963)). The district court correctly determined that the double jeop-

ardy standards applicable to mistrials are applicable in other contexts, *see, e.g.*, *Lee v. United States*, 432 U.S. 23, 31 (1977) (where trial court granted motion to dismiss charging instrument as insufficient, and such dismissal was made in contemplation of a second prosecution, such dismissal is "functionally indistinguishable from a declaration of mistrial"), and that those standards should be applied to the nonsubmission of Maula's weapons counts under New York Criminal Procedure Law § 300.40(7). *See People ex rel. Maula*, 782 F.Supp. at 893-99.

Where a defendant either objects or fails to consent to a trial court's declaration of a mistrial, double jeopardy will bar a second prosecution unless there was a "manifest necessity" for the mistrial. *See United States v. Dinitz*, 424 U.S. 600, 606-07 (1976). No "manifest necessity" analysis is required, however, when a defendant requests a mistrial, or consents to one, *id.* at 608; *see also Oregon v. Kennedy*, 456 U.S. 667, 672 (1982), unless the government or the court acts in a manner intended to provoke a defendant to move for a mistrial. *Id.* at 679.

The district court here found that Maula had expressly consented to the nonsubmission of the weapons counts. Consent could also be properly inferred from Maula's failure to object when the state trial court announced that it would not submit the weapons counts to the jury—after the trial court had first denied Maula's motion to dismiss those counts for failure of proof. *See United States v. Goldstein*, 479 F.2d 1061, 1067 (2d Cir.) (consent implied from "totality of circumstances" where defendants moved for mistrial two hours before court actually declared mistrial and failed to object to the mistrial when jury was discharged), *cert. denied*, 414 U.S. 873 (1973); *Camden v. Circuit Court of Second Judicial Circuit*, 892 F.2d 610, 615 (7th Cir. 1989) (consent can be inferred where defen-

dant was afforded "minimal but adequate opportunity to object" while mistrial was being declared), *cert. denied*, 495 U.S. 921 (1990).

Maula was left with a clear strategic choice after the trial court denied his motion to dismiss based on insufficiency of proof. On the one hand, Maula could have objected to the nonsubmission of the weapons counts, seeking to further his substantial interest in having a single jury adjudicate all charges against him. That choice would have preserved the double jeopardy claim for later review under the manifest necessity analysis. On the other hand, Maula could have consented to the nonsubmission and thereby waived any objection to the procedure. This choice would have furthered his interest in avoiding adjudication of the weapons charges at that time and by that jury; of course, it would also expose him to the possibility of a further prosecution. By failing to object in this context, where the trial court had clearly denied Maula's motion for the equivalent of an acquittal, Maula selected the latter option and the risks that went with it.

Inferring consent from counsel's failure to object in this case is not only consistent with the requirements of the double jeopardy clause; it also tracks the general principle applied in other areas of trial practice, when failure to object to a ruling, which at the time it is made or proposed could readily be changed, will bar future attempts to review that ruling. *See* Fed. R. Evid. 103(a) ("[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected" and a timely objection is made); Fed. R. Crim. P. 51 (exceptions unnecessary when "a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the

court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party"); Fed. R. Crim. P. 30 ("[n]o party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection"). As where a defendant requests a mistrial, the crucial consideration in determining consent under the double jeopardy clause "is that the defendant retain primary control over the course to be followed in the event of [judicial or prosecutorial] error." *Dinitz*, 424 U.S. at 609. In this case, the defendant retained control over whether to object to the nonsubmission, especially where the state trial court had denied his previous motion to dismiss for insufficiency.

Affirmed.

APPENDIX B—Opinion of the United States District Court, S.D. of New York, Dated January 23, 1992.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PEOPLE *ex rel.* KENNETH MAULA,

Petitioner,

against

LLOYD FRECKLETON, Warden of the Rikers Island Correctional Facility,

Respondent.

91 Civ. 8056 (DNE)

Appearances:

Frost & Berenholtz, New York, New York (Gary L. Berenholtz, of counsel) for petitioner;

Robert T. Johnson, District Attorney, Bronx County (Daniel S. Ratner, Assistant District Attorney, of counsel) for respondent.

EDELSTEIN, District Judge:

Petitioner Kenneth Maula ("Maula" or "Petitioner") seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner claims that his conviction on a gun charge in Supreme Court of the State of New York is invalid under the double jeopardy clause of the United States Constitution. For the reasons stated below, the writ of habeas corpus is denied.

BACKGROUND

This case arises out of the fatal shooting of Dr. Louis DeBellis on July 18, 1985. Petitioner, who was ultimately indicted and convicted on a charge connected with this death, had known DeBellis for some time before the shooting. DeBellis had purchased property in Bronx County from petitioner and, subsequently, petitioner and DeBellis became close friends. The relationship deteriorated, however, when petitioner refused to perform an agreement to sell DeBellis another property. DeBellis commenced an action against petitioner which resulted in a judgment that directed petitioner to sell the property to DeBellis. Petitioner obtained a stay of the decision pending appeal on the condition that he provide a bond and perfect his appeal by a specified date.

On the day before the bond was due, petitioner and DeBellis engaged in a heated argument at petitioner's printing business, during which DeBellis punched petitioner and threatened him with further injury. DeBellis then left petitioner's office and went downstairs, presumably to leave the building. To assure that DeBellis actually had departed the premises, petitioner, after removing a loaded gun from his desk, followed DeBellis downstairs. After exchanging more

words, petitioner fired three shots at DeBellis, one of which struck DeBellis and killed him.[1]

On August 6, 1986, petitioner was indicted in New York Supreme Court, Bronx County, for murder in the second degree, criminal possession of a weapon in the second degree and criminal use of a firearm in the second degree in connection with this shooting. During the trial, petitioner moved to dismiss all three counts due to insufficient evidence.[2] The court denied petitioner's motion. Without explanation, however, Justice Warner, who presided at this trial, ultimately asked the jury to consider only the second degree murder count and lesser included homicide offenses; he did not submit the weapons charges to the jury. On January 9, 1987, petitioner was convicted of the lesser included offense of manslaughter in the first degree.

The Appellate Division, First Department, reversed petitioner's conviction. The Appellate Division found that at trial, petitioner had raised an affirmative defense of lack of criminal responsibility due to mental disease or defect, and had introduced psychiatric testimony in support of this defense. The trial court, however, refused to instruct the jury not to consider such testimony when determining whether defendant committed the crime. The Appellate Division reversed because the lower court should have provided a limiting instruction concerning the psychiatric testimony. *See People v. Maula*, 526 N.Y.S.2d at 444-45.

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[1]These facts are taken from the Appellate Division's decision in *People v. Maula*, 138 A.D.2d 307, 526 N.Y.S.2d 441, 442-43 (1st Dep't 1988), *appeal denied*, 72 N.Y.2d 863, 532 N.Y.S.2d 513, 528 N.E.2d 903 (1988).

[2]Criminal Procedure Law section 290.10 provides that a dismissal due to insufficient evidence is termed a "trial order of dismissal." A court may grant a trial order of dismissal when "the trial evidence is not legally sufficient to establish the offense charged . . . or any lesser included offense." Criminal Procedure Law § 290.10.

The state decided to seek a new trial. Because petitioner was convicted of a lesser included offense not contained in the original indictment, however, New York law required the State to obtain a new indictment. *See People v. Beslanovics*, 57 N.Y.2d 726, 727, 454 N.Y.S.2d 712, 440 N.E.2d 797 (1982). The new indictment charged petitioner with manslaughter in the first degree, criminal use of a firearm in the first and second degrees and criminal possession of a weapon in the second degree.

On June 28, 1989, petitioner was convicted of fourth degree criminal possession of a weapon, a misdemeanor, and acquitted on all other charges. The court sentenced petitioner to a prison term of one year. On appeal, the Appellate Division vacated the sentence because the lower court "erred when it considered the death of the victim in determining the sentence to be imposed on the defendant for the misdemeanor gun charge." *People v. Maula*, 163 A.D.2d 180, 558 N.Y.S.2d 42, 43 (1st Dep't 1990). Petitioner never presented to the Appellate Division a claim that his trial on the weapons charge violated the Fifth Amendment's double jeopardy clause. On October 23, 1990, the Supreme Court resentenced petitioner to a one-year prison term. The Appellate Division affirmed the sentence and rejected petitioner's sole argument, that the sentence was excessive.

Petitioner then sought a writ of habeas corpus in New York Supreme Court on the ground that his retrial on gun possession charges violated federal and state constitutional protections against double jeopardy. The New York Supreme Court determined that it could hear the petition despite petitioner's failure to raise a double jeopardy argument on direct appeal. *See People ex rel. Maula v. Freckleton*, No. 8497-1991 (Sup. Ct. Bronx Co. Apr. 5, 1991). The court, however, denied the petition on the merits. *See id.* The court reasoned that the double jeopardy clause bars

reprosecution only where a defendant is acquitted or a charge is dismissed due to insufficient evidence. The court found that the decision not to submit gun charges to the jury was not a dismissal based upon a failure of proof or legal insufficiency. Accordingly, the court held that the double jeopardy clause did not bar petitioner's second trial on the gun charges. *See id.*

The Appellate Division granted petitioner's application for bail pending appeal of the Supreme Court's order. On October 17, 1991, the Appellate Division affirmed the lower court's decision. *See People ex rel. Maula v. Freckleton*, 574 N.Y.S.2d 753 (1st Dep't 1991). On November 19, 1991, the New York Court of Appeals denied petitioner leave to appeal. *See People ex rel. Maula v. Freckleton*, No. 1255 (Nov. 19, 1991).

On December 2, 1991, petitioner, by order to show cause, asked this Court to stay execution of his sentence pending disposition of this petition for federal habeas relief. Petitioner had been scheduled to return to prison on December 5, 1991. This Court signed the order to show cause and granted petitioner's application for a stay. It also scheduled oral argument and a hearing for December 4, 1991. The argument and hearing took place on December 4 and December 5, 1991.

Discussion

Petitioner argues that his retrial on gun charges violates the double jeopardy clause of the Fifth Amendment. The State argues that petitioner may not obtain federal habeas relief because petitioner failed to exhaust his state remedies. In the alternative, the State contends that retrial in this case does not violate the double jeopardy clause.

A. Exhaustion

The State concedes that petitioner raised a double jeopardy argument in the state habeas proceedings. The State contends, however, that the double jeopardy argument petitioner presented to the state courts differed from the claim presented here. Specifically, the State asserts that while petitioner argued state statutory and constitutional double jeopardy law before the state courts, the claim before this Court involves federal principles of double jeopardy. The State alleges that these separate theories involve distinct legal contentions and have different factual underpinnings. Because petitioner never expressly presented the federal claim to the state courts, the State asserts that this claim is not exhausted and that this Court, under *Rose v. Lundy*, 455 U.S. 509, 522 (1982), must dismiss Maula's "mixed petition" of exhausted and unexhausted claims.

Before a federal court may grant habeas relief to a state prisoner, the petitioner must first exhaust available state remedies. *See* 28 U.S.C. § 2254(b)-(c); *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Irvin v. Dowd*, 359 U.S. 394, 404-05 (1959). The exhaustion doctrine is not jurisdictional, but rather it is based on principles of comity and federalism. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Rose*, 455 U.S. at 515; *Darr v. Burford*, 339 U.S. 200, 204-05 (1950). Exhaustion requires that petitioner give state tribunals a fair opportunity to decide any federal constitutional claims. *See Rose*, 455 U.S. at 515; *Picard*, 404 U.S. at 275.

A fair opportunity consists of informing the state court of both the factual and legal premises of a constitutional claim. *See Picard*, 404 U.S. at 276-77; *Gonzalez v. Sullivan*, 934 F.2d 419, 422 (2d Cir. 1991). This requirement is satisfied if the legal and factual bases of petitioner's federal habeas claim is the substantial equivalent of claims presented to the state court. *See Picard* at 278; *County Court v. Allen*, 442 U.S. 140, 147-48 n.5 (1979). "Adherence to exhaustion principles does not require a

petitioner to raise his claims by citing chapter and verse of hornbook law; it simply mandates that the state be given a fair opportunity to hear the claim." *Blissett v. Lefevre*, 924 F.2d 434, 439 (2d Cir.) (quoting *Abdurrahman v. Henderson*, 897 F.2d 71, 73 (2d Cir. 1990)), *cert. denied*, 112 S. Ct. 158 (1991).

The Second Circuit, in analyzing the exhaustion doctrine's "fair opportunity" requirement, has stated that:

> even if a particular matter is not treated generally as having constitutional dimension, if the courts of the state in question have themselves previously treated the fact pattern as appropriate for constitutional analysis, it would be unreasonable to suppose that they are not alert to constitutional considerations. Thus we consider that a defendant who cites state (or federal) precedent that employs pertinent constitutional analysis has adequately put the state courts on notice of the constitutional thrust of his claim.

Daye v. Attorney General of New York, 696 F.2d 186, 194 (2d Cir. 1982) (*en banc*).

Petitioner has exhausted state remedies by giving the state courts a fair opportunity to adjudicate his Fifth Amendment double jeopardy argument. Petitioner expressly presented a federal constitutional double jeopardy claim to New York's Appellate Division by entitling his brief's primary argument "Did the Court below err in finding that the submission of the weapons counts to the jury in the second trial was not a violation of double jeopardy as set forth in the Constitution of the United States."

In addition, petitioner's brief to the Appellate Division contains an extensive discussion of the double jeopardy issue, both under New York statutory principles and under federal constitutional law. For instance, petitioner's brief cites United States

Supreme Court and federal district court decisions that interpret the Constitution's double jeopardy clause. It also quotes from New York state court decisions that employ United States Supreme Court precedents. Furthermore, the state habeas courts rejected petitioner's claim for relief on double jeopard grounds, which reveals their awareness of this issue. Even if petitioner did not expressly present a federal constitutional double jeopardy claim, the New York courts were alerted to the existence of a possible federal constitutional claim and had a fair opportunity to adjudicate it. Accordingly, petitioner's claim is exhausted and this Court may address the merits of his habeas petition.

B. The Merits: Double Jeopardy

Having exhausted his state court remedies, petitioner seeks a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, on the ground that his gun conviction in the second state court trial violates the double jeopardy clause of the Fifth Amendment. Petitioner asserts that the indictment associated with his first state court trial contained homicide and weapons charges, but the judge in that case, Justice Warner, chose not to submit the weapons counts to the jury. Under New York Criminal Procedure Law ("CPL") section 300.40(6)-(7),[3] a count not submitted to the jury is deemed dismissed. After the Appellate Division reversed petitioner's conviction for manslaughter, the

[3]Criminal Procedure Law § 300.40 provides in relevant part that:

> 6. Notwithstanding any other provision of this section, the court is not required to submit any particular count to the jury when:
> * * *
> (b) The number of counts or the complexity of the indictment requires selectivity by the court in order to avoid placing an unduly heavy burden upon the jury in its consideration of the case. In such case, the court may submit to the jury a portion of the counts which are representative of the people's case.
> 7. Every count not submitted to the jury is deemed dismissed by the court . . . .

State obtained a new indictment that contained homicide and weapons counts. Petitioner argues that because his gun counts were considered dismissed under CPL § 300.40, reprosecution was improper under the double jeopardy clause of the Fifth Amendment of the United States Constitution.

In opposing the petition, the State cites CPL § 470.55(1),[4] which allows retrial on non-submitted counts unless such counts are dismissed on the merits after an adjudication of the facts. The state alleges that because the judge's decision not to submit the gun counts to the jury was not due to insufficient evidence, and, therefore, was not an adjudication of the facts, the double jeopardy clause permits retrial.

Federal habeas relief does not, of course, turn on interpretations of state law. *See Rogers v. Peck*, 199 U.S. 425 (1905). This Court assumes that the parties' statutory arguments are an aspect of their federal constitutional claims regarding whether retrial in this instance violates the double jeopardy clause.

The Fifth Amendment, which provides that no "person shall be subject for the same offence to be twice put in jeopardy of life or limb . . . ," U.S. Const. amend. V, applies to the states through the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784, 787 (1969). The double jeopardy clause implies that "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by rever-

[4]Criminal Procedure Law § 470.55(1) provides that:

> Upon a new trial of an accusatory instrument resulting from an appellate court order reversing a judgement and ordering such new trial, such accusatory instrument is deemed to contain all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendent was acquitted or deemed to have been acquitted, and (b) those dismissed upon appeal or upon some other post-judgement order.

sal." *United States v. Scott*, 437 U.S. 82, 91 (1978) *Burks v. United States*, 437 U.S. 1 (1978).

Nevertheless the double jeopardy clause does not bar all reprosecutions. Retrial may be appropriate where a case is aborted for reasons other than an acquittal or insufficient evidence. *See Arizona v. Washington*, 434 U.S. 497, 505 (1978). For instance, in the case of a mistrial, retrial is appropriate where there was "manifest necessity" for aborting the trial over a defendant's objections.[5] *See id.*

For the reasons stated below, this Court finds that the state court's decision not to submit the gun count to the jury did not rest on a determination of insufficient evidence. Accordingly, retrial may be appropriate. To assess whether retrial is proper in this situation, this Court concludes, also for the reasons stated below, that the double jeopardy standard governing mistrials should also control non-submission of charges to a jury. Under the mistrial standard, where a defendant objects to a mistrial,

[5] "Manifest necessity" is found only if a "scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *United States v. Jorn*, 400 U.S. 470, 485 (1971). The record must reflect that the trial court kept "in the forefront the defendant's valued right 'of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.'" *United States v. Starling*, 571 F.2d 934, 938 (5th Cir. 1978) (quoting *Jorn*, 400 U.S. at 486).

Factors courts have considered include whether the trial judge consulted counsel before declaring a mistrial, and whether the record indicates that the judge considered alternatives to declaring a mistrial. *See Arizona v. Washington*, 434 U.S. 497, 514 n.34 (1978); *Grandberry v. Bonner*, 653 F.2d 1010, 1015 (5th Cir. 1981); *Illinois v. Somerville*, 410 U.S. 458, 469-70 (1973). "A precipitate decision, reflected by a rapid sequence of events culminating in a declaration of a mistrial, would tend to indicate insufficient concern for the defendant's constitutional protection." *Brady v. Samaha*, 667 F.2d 224, 229 (1st Cir. 1981); *see also Lovinger v. Circuit Court of 19th Judicial Dist.* , 845 F.2d 739, 745-746 (7th Cir.) (court refused to find manifest necessity where judge made no record, did not consult with counsel and appeared to declare a mistrial in a rash fashion), *cert. denied*, 488 U.S. 851 (1988).

reprosecution is permissible only if there was manifest necessity for declaring a mistrial. Where, however, a defendant consents to a mistrial, the state may retry a defendant unless the prosecutor or judge obtained defendant's consent in bad faith. *See Oregon v. Kennedy*, 456 U.S. 667 (1982); *Lee v. United States*, 432 U.S. 23, 32-33 (1977). *United States v. Dinitz*, 424 U.S. 600, 606-07 (1976); *Vazquez v. Scully*, 694 F. Supp. 1094 (S.D.N.Y. 1988).

Therefore, a defendant who objects to the non-submission of charges may not face retrial unless the state can show manifest necessity for the non-submission. Where a defendant consents to the non-submission decision, however, retrial is appropriate unless the consent was induced by judicial or prosecutorial bad faith.

1. Non-Submission Was Not an Adjudication of the Facts

The trial court's decision not to submit the weapons charges to the jury in petitioner's first trial was not an acquittal or based upon a finding of insufficient evidence. The evidence at trial was sufficient to send the gun charge to the jury.

While testifying at the first trial, petitioner admitted firing an unlicensed weapon. *See People v. Maula*, 526 N.Y.S.2d at 444. Also at this first trial, after the State and petitioner had presented their cases to the jury, petitioner moved for a trial order of dismissal, or a dismissal due to insufficient evidence, on the weapons charges. See CPL § 210.10. Justice Warner denied this motion. Immediately after denying the motion, Justice Warner stated his intention not to submit the gun charges to the jury. This Court must conclude, therefore, that Justice Warner chose not to submit the gun charges to the jury for reasons other than lack of proof. Based on such evidence, New York Supreme Court

and the Appellate Division found that Justice Warner's decision not to submit the gun counts was not due to insufficient evidence. *See People ex rel. Maula v. Freckleton*, No. 8497-1991 (Sup. Ct. Bronx Co. Apr. 5, 1991) ; *People ex rel. Maula v. Freckleton*, 574 N.Y.S.2d 753 (1st Dep't 1991). Accordingly, this Court concludes that Justice Warner's decision not to submit the gun charges to the jury was not an acquittal or a decision on the merits.

2. Double Jeopardy Mistrial Standard Governs Non-Submission of Charges Where Non-Submission Not Based on Insufficient Evidence

Because this Court concludes that Justice Warner chose not to submit the weapons charges to the jury for reasons other than insufficient evidence, retrial may be appropriate. As previously noted, in assessing whether retrial is appropriate when a judge decides not to submit counts to a jury for reasons other than failure of proof, this Court adopts the double jeopardy standard in the case of a mistrial. Accordingly, where a defendant objects to non-submission of a count, the double jeopardy clause bars retrial unless there was manifest necessity for the mistrial. In contrast, where a defendant consents to the non-submission, the state may retry defendant absent prosecutorial or judicial bad faith.

a. Rationale for Double Jeopardy Rule in Mistrial Cases

It is appropriate to employ the mistrial standard in the non-submission context because the rationales that animate the mistrial rule apply with equal force where a judge decides not to submit counts to a jury. The double jeopardy clause protects individuals against the financial and emo-

tional hardships of successive prosecutions and also prevents the unfairness that would result if the state had a second opportunity to obtain a conviction. *See Gori v. United States*, 367 U.S. 364, 369 (1961); *Green v. United States*, 355 U.S. 184, 187-88 (1957). The clause protects "a defendant's valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

The double jeopardy mistrial standards are based on the idea that retrial even after an uncompleted initial trial may be unfair. A retrial "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed." *Arizona v. Washington*, 434 U.S. 497, 503-04 (1978); *see also United States v. Jorn*, 400 U.S. 470, 483 (1971); *Gori v. United States*, 367 U.S. 364, 369 (1961); *Green v. United States*, 355 U.S. 184, 187-88 (1957).

Nevertheless, the double jeopardy clause does not bar all reprosecutions. The standards governing retrial in a mistrial scenario attempt to balance the concerns underlying the double jeopardy clause with the public's interest in just judgments. *See Wade v. Hunter*, 336 U.S. 684, 689 (1949). The Supreme Court has stated that:

> Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to the jury.

Arizona v. Washington, 434 U.S. at 505; *see Jorn*, 400 U.S. at 479-80.

In an attempt to balance these interests, the Supreme Court has held that in order to retry a defendant who objects to a mistrial, "in view of the importance of the right [to resolve all charges in one proceeding], and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of . . . [showing] 'manifest necessity' for any mistrial declared over the objection of the defendant." *Id.*

Therefore, in the case of a mistrial, a defendant who consents to the termination of the first trial may again be tried on the same offense, unless the judge or prosecutor intended to cause a mistrial. *See Oregon v. Kennedy*, 456 U.S. 667 (1982); *Lee v. United States*, 432 U.S. 23, 32-33 (1977). In contrast, absent such consent, a defendant may be retried on the same offense only if there was manifest necessity for the mistrial. *See United states v. Dinitz*, 424 U.S. 600, 606-07 (1976); *Vazquez v. Scully*, 694 F. Supp. 1094 (S.D.N.Y. 1988).

b. Rationale for Mistrial Standards Exists in Non-Submission Scenario

Where a judge's decision not to submit a charge is not an acquittal or an adjudication of the facts, a mistrial and non submission of charges implicate similar double jeopardy concerns. In both cases, a defendant's trial ends before resolution of the merits, which raises the possibility of a retrial. While in each scenario a defendant may welcome a judge's decision to abort an ongoing proceeding, other defendants may understandably crave resolution of the charges in the current proceeding, without further emotional and financial strain or the ongoing stigma attached to being under indictment. Accordingly, a defendant who objects to non-submission of a charge opts for final resolution today in the current trial. By such objection, a defendant precludes a retrial absent manifest

necessity for not submitting the count. On the other hand, a defendant who consents to non-submission of a count gambles that the state will either not initiate a retrial or that a second trial will prove more favorable than the current proceeding. In such a scenario, a defendant accepts the burdens associated with a retrial unless the prosecution or the court acted in bad faith to obtain defendant's consent.

While it may seem anomalous to require a defendant to object to a dismissal of a count in order to invoke the higher protection against retrial afforded by the manifest necessity standard, New York law creates this bizarre situation. Under CPL § 300.40(7), where a judge decides not to submit counts to a jury, those counts are deemed dismissed; where, however, the prosecution objects to the non-submission of a count, the dismissal is treated as a trial order of dismissal. *See* CPL § 300.40(7). New York defines a trial order of dismissal as a dismissal due to insufficient evidence, which bars retrial. See CPL § 290.10. Therefore, when a prosecutor does not object to non-submission of a count, a defendant must understand that under New York law, this non-submission is simply a dismissal, which may not be based on the merits and which thus may not bar retrial.[6] Accordingly, a defendant who wishes finally to resolve a non-submitted charge in the current proceeding should object to the judge's decision in order to

[6]Pursuant to *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), a federal court should defer adjudication of state law issues to give state courts an opportunity to decide whether an allegedly unconstitutional state practice was authorized by an ambiguous state law. Either the legislature or the courts of the State of New York must determine the meaning of a dismissal pursuant to Criminal Procedure Law § 300.4(7). Accordingly, this Court has not attempted to determine whether any result automatically flows from, or any meaning automatically attaches to, a dismissal pursuant to CPL §§ 300.40(6)-(7). *See Illinois v. Sommerville*, 410 U.S. 458 (1973); *Duncan v. Tennessee*, 405 U.S. 127 (1972). Instead, after examining the circumstances surrounding the trial court's decision not to submit the weapons counts to the jury, this Court has concluded that the non-submission decision was not an acquittal or a decision on the merits. *See supra* at 12-13.

invoke the manifest necessity standard should the issue of a retrial arise.

Requiring a defendant to object to non-submission of a count to a jury is no more strange than requiring a defendant to object to a mistrial. In both cases, a defendant avoids, at least temporarily, prosecution of part or all of the case. Nevertheless, in each case, retrial may be appropriate. A defendant's objection, therefore, is based not on the dismissal of the count or, in the case of a mistrial, on the termination of proceedings, but on the transitory nature of that dismissal or termination.[7]

It is worth noting that under the rule formulated in this Opinion, section 470.55(1) may, in certain circumstances, produce a result that violates the double jeopardy clause of the Fifth Amendment. As previously noted, section 470.55(1) permits the State to retry a defendant on dismissed counts

[7]The only other federal case that addresses the effect of a judge's decision not to submit a count under CPL section 300.4(6) is *Faux v. Jones*, 728 F. Supp. 903 (W.D.N.Y. 1990). In *Faux*, the trial court dismissed 200 counts of a 340 count indictment for insufficient evidence. Of the remaining 140 counts, the court submitted only 14 to the jury as a representative sampling pursuant to CPL § 300.4(6). *See id.* at 905. The jury convicted petitioner on eight of the fourteen submitted counts, but the Appellate Division reversed the conviction. The State obtained a new indictment that contained 29 counts, 19 of which had not been submitted to the jury in the first trial. *See id.* Petitioner was convicted of all 29 counts. After appealing the conviction, petitioner sought a writ of habeas corpus on the ground that retrial on the counts not submitted to the jury in the first trial violated the double jeopardy clause of the United States Constitution. *See id.* at 906.

The court asked whether "despite the absence of . . . finding an actual resolution of the constructively dismissed charges, reprosecution should have been barred." *Id.* at 908. The court concluded that the double jeopardy standard governing mistrials should control retrial issues involving non-submission of counts to a jury. *See id.* The court found, however, that there was manifest necessity for "not submitting more than a few representative counts to the jury and constructively dismissing the rest pursuant to CPL § 300.40." *Id.* While it is unclear whether the *Faux* court would require a showing of manifest necessity if a defendant does not object to non-submission of counts, this court concludes that a showing of manifest necessity is required in order to retry a defendant only upon defendant's objection to the non-submission.

except where the dismissal is an acquittal or may be deemed an acquittal. This exception is obviously an attempt to align the statute with the double jeopardy clause by prohibiting retrial after a decision on the merits. Nevertheless, this exception does not address all double jeopardy concerns. It appears to this Court that section 470.55(1) permits the State to retry a defendant where a judge "dismisses" a count, by not submitting it to the jury over defendant's objection, without requiring the state to show manifest necessity for the non-submission. In addition, section 470.55(1) seems to permit retrial where the judge's decision not to submit a count to a jury is based on prosecutorial or judicial bad faith. Either of these interpretations of section 470.55(1) would lead to a result that contravenes the Fifth Amendment.

Of course, this exact issue is not before this Court and, equally important, this Court has no desire to intrude on the right of state courts to interpret state statutes. Were this Court able to certify this question to the New York Court of Appeals, as a question of New York Law "for which there is no controlling precedent," it would gladly do so. *See* Rules of the New York's Court of Appeals § 500.17(a). Unfortunately, only courts of last resort or federal appellate courts may certify questions to the New York Court of Appeals. *See id.* Nevertheless, given the importance of a defendant's Fifth Amendment rights, this Court believes that it is appropriate at least to raise these federal constitutional concerns.

3. Application of This Standard: Petitioner Consented to Non-Submission and No Bad Faith

Because petitioner and his counsel, Mr. Edward M. Rappaport,[8] consented to Justice Warner's decision not to submit the weapons counts to the jury, the State may retry

[8]Mr. Rappaport subsequently became a New York Supreme Court Justice, and this Opinion will refer to him as Justice Rappaport.

petitioner absent judicial or prosecutorial bad faith. The trial transcript reveals that petitioner's counsel consented to the non-submission. In discussing the judge's charge, the following colloquy occurred:

> Court: Do you want to know the charge that I am submitting?
>
> Prosecution: Yes.
>
> Court: Murder 2; Man 1, Man 2, Criminally Negligent Homicide
>
> * * *
>
> Defense Counsel ("DC"): Are you going to submit any lesser included gun charge?
>
> Court: No.
>
> DC: It's my—
>
> Court: I just gave you what I am submitting.
>
> DC: You're submitting [the gun count]?
>
> Court: No, I'm not.
>
> DC: Not at all?
>
> Court: No.
>
> DC: The guns are not going to the jury at all?
>
> Court: No.
>
> DC: In other words, if they should find him not guilty of all four homicides that's the end of the case?
>
> Court: Yes.
>
> DC: No guns?
>
> Court: No.
>
> DC: I don't have to get involved with a gun discussion. All right.
>
> Court: You don't have a separate position.
>
> DC: I understand that. That is why I didn't request it in my charge—in my request.
>
> Court: Anything else?
>
> DC: Can we talk about scheduling a little bit, Judge?

Trial Transcript at 774-75. This record reflects that petitioner's counsel understood that the judge would not submit the gun charge to the jury.

Moreover, despite such comprehension, petitioner's defense counsel failed to register an objection to the trial court's decision. At the hearing before this Court, defense counsel admitted that he did not object to non-submission of the counts. *See* Dec. 5, 1991 hearing at 6, 9-10. At the December 5 hearing, Justice Rappaport stated that:

> Judge, the fact of the matter is that I believe the law of the State of New York, if this judge wanted not to send these counts, that it was deemed dismissed, which was the very thing I was asking him to do. I moved to dismiss the third count. Now he's not sending it to the jury. He denies my motion by not sending it. And the statute is clear that if he doesn't send it, it's going to be dismissed. I have to be an idiot to object.

Dec. 5, 1991 Hearing at 18; *see also* Dec. 5 Hearing at 12. While petitioner may not have solicited non-submission of the charge, petitioner and his counsel certainly acquiesced in the judge's decision.[9]

While this Court believes that Justice Rappaport expressly consented to non-submission of the counts, in appropriate

[9]Furthermore, defense counsel's consent to non-submission of counts is valid and effective even if given in the erroneous belief that the State could not retry petitioner. At the December 5 hearing, Justice Rappaport stated that he believed that the double jeopardy clause barred a retrial on the counts "dismissed" under CPL § 300.4. *See* Dec. 5 hearing at 30-31. It is possible that based on this belief, defense counsel did not object to non-submission of the counts, and indeed, it is apparent that he even consented to it. Nevertheless, this Court has decided that non-submission does not bar retrial in this case. Defense counsel's erroneous interpretation of New York statutory and United States constitutional law does not vitiate petitioner's consent.

situations courts have implied consent after examining "the totality of the circumstances." *United States v. Goldstein*, 479 F.2d 1061, 1067 (2d Cir.), *cert. denied*, 414 U.S. 873 (1973). For instance, courts will imply consent when a defendant fails to object to a judge's decision after having an opportunity to register an objection. *See Camden v. Circuit Court of Second Judicial Circuit*, 892 F.2d 610 (7th Cir. 1989), *cert. denied sub nom., Camden v. Circuit Court of Crawford County*, 110 S. Ct. 1954 (1990); *United States v. Smith*, 621 F.2d 350, 352 (9th Cir. 1980); *United States v. Gentile*, 525 F.2d 252, 255 (2d Cir. 1975), *cert. denied*, 425 U.S. 903 (1976). *Compare United States v. Jorn*, 400 U.S. 487 (1971) (no consent where defendant had no opportunity to object); *United States v. Bates*, 917 F.2d 388 (9th Cir. 1990) (no consent where after declaring mistrial, court refused counsel's request to be heard); *United States v. Ramirez*, 884 F.2d 1524, 1529 (1st Cir. 1989) (no implied consent where defendant not given opportunity to object to mistrial); *United States v. Kwang Fu Peng*, 766 F.2d 82 (2d Cir. 1985) (no implied consent where defendant withdrew motion for mistrial).

Justice Rappaport obviously understood that Justice Warner had decided not to send the gun counts to the jury. The trial transcript reveals that defense counsel repeatedly sought to clarify what counts Justice Warner would send to the jury and that Justice Rappaport fully understood Justice Warner's decision. *See* Trial Transcript at 770-79 (*reprinted supra* at 19-20). He could have objected to non-submission at this time. He testified before this Court, however, that he chose not to record an objection. See Dec. 5 Hearing at 18, 32, 38. Accordingly, this Court may imply that defense counsel consented to the non-submission decision. Of course, because this Court finds that defense counsel expressly consented to non-submission of the counts, it has no need to resort to an implied consent theory.

Because petitioner consented to non-submission of the weapons counts, retrial is appropriate without requiring the State to show manifest necessity for Justice Warner's decision not to submit the gun counts to the jury. The State may retry petitioner on the gun charges unless the prosecution or the court acted in bad faith to obtain petitioner's consent. Petitioner has not presented, nor does it appear to this Court there exists, any evidence of bad faith. Petitioner's reprosecution on weapons charges, therefore, does not violate the double jeopardy clause of the United States Constitution.

Conclusion

Accordingly, the petition for a writ of habeas corpus is denied.

SO ORDERED

DATED: January 23, 1992
New York, New York

DAVID N. EDELSTEIN
U.S.D.J.